Tammy Sportswear Corporation *and* Joint Board Cloak, Skirt and Dressmakers' Union, International Ladies' Garment Workers' Union, AFL–CIO. Case 1–CA–27095

May 7, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On a charge filed by the Joint Board Cloak, Skirt and Dressmakers' Union, International Ladies' Garment Workers' Union, AFL–CIO (Union) on February 23, 1990, the General Counsel of the National Labor Relations Board issued a complaint on April 2, 1990, against Tammy Sportswear Corporation, the Respondent, alleging that it has violated Section 8(a)(5) and (1) by failing and refusing to make contractually required contributions to employee benefit funds. Copies of the complaint were served on the Respondent. The Respondent filed a timely answer admitting all the factual allegations in the complaint and asserting an affirmative defense.

On July 27, 1990, the General Counsel filed a Motion to Transfer Proceeding to the Board, To Strike Respondent's Affirmative Defense, and for Summary Judgment. On July 31, 1990, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

Ruling on Motion for Summary Judgment

The Respondent's admission to all the factual allegations in the complaint establishes that (1) the Union was the recognized and exclusive collective-bargaining representative of the Respondent's employees in an appropriate bargaining unit composed of all the Respondent's nonsupervisory production, maintenance, packing, and shipping workers; (2) the Respondent was obligated under the terms of its collective-bargaining agreement with the Union to make monthly payments to the Union for and on behalf of the Union's Health and Welfare Fund, Retirement Fund, and Health Services Plan; and (3) the Respondent stopped making those contractually required contributions without prior notice to or consent of the Union.

It is well established that an employer who is a party to an existing collective-bargaining agreement violates Section 8(a)(5) and (1) of the Act when it modifies the terms and conditions of employment established by that agreement without obtaining the consent of the union. *Rapid Fur Dressing*, 278 NLRB 905, 906 (1986). Here, the Respondent has admitted that it has unilaterally discontinued making its contractually required payments to the Health and Welfare Fund, the Retirement Fund, and the Health Services Plan. The Respondent raises as an affirmative defense that it lacks the financial ability to make the required payments. Such an economic necessity claim, even if proven, does not constitute an adequate defense to an allegation that an employer has unlawfully failed to abide by the provisions of a collective-bargaining agreement. *Raymond Prats Sheet Metal Co.*, 285 NLRB 194, 196 (1987); *International Distribution Centers*, 281 NLRB 742, 743 (1986); and *Hiysota Fuel Co.*, 280 NLRB 763 (1986).[1] Accordingly, the Respondent has admitted all the facts material to a resolution of the unfair labor practice issues raised by the complaint and has not raised an adequate defense to the complaints allegations.

Because we find the affirmative defense submitted by the Respondent to be inadequate, we grant the General Counsel's motion to strike. Because there are no material facts in dispute, and in the absence of any cause to the contrary having been shown by the Respondent, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation with an office and place of business in Boston, Massachusetts, where it annually provides stitching services valued in excess of $50,000 for various employers located in Massachusetts who sell and ship garments valued in excess of $50,000 to points located outside the Commonwealth of Massachusetts. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

[1] In Member Oviatt's view, there may be limited circumstances, not present here, in which an employer's financial inability to pay may constitute a defense to an allegation that it unilaterally and unlawfully ceased contractually required payments to union benefit funds. To make this defense successfully, an employer must establish that it continued to recognize—and did not repudiate—its contractual obligations. To satisfy this requirement, an employer must prove that its nonpayment was followed by its request to meet with the union to discuss and resolve the nonpayment problem. In so doing, an employer demonstrates its adherence to the contract and the bargaining process. In such circumstances, Member Oviatt would find that an employer's nonpayment of contractually required benefit fund payments would not violate Sec. 8(a)(5) of the Act.

All non-supervisory production, maintenance, packing, and shipping workers employed by Respondent at its Boston, Massachusetts location, excluding office clerical employees, professional employees, guards and all supervisors as defined in the Act.

At all material times the Union has been the designated exclusive collective-bargaining representative of the employees in the unit and has been recognized as such by the Respondent. Recognition has been embodied in a collective-bargaining agreement, effective from June 15, 1988, to June 15, 1991. By virtue of Section 9(a) of the Act, the Union is the exclusive representative of employees in the bargaining unit for the purposes of collective bargaining concerning rates of pay, wages, hours of employment, and other terms and conditions of employment.

The parties' collective-bargaining agreement requires the Respondent to make monthly monetary contributions to the Union for and on behalf of the Health and Welfare Fund, the Retirement Fund, and the Health Services Plan. Since about September 20, 1989, the Respondent has failed and refused to make the monthly payments to the above Funds and Plan, and has not obtained the Union's consent. By those acts and conduct, the Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

CONCLUSION OF LAW

By ceasing during the term of the contract to make contractually required payments to the Union's Health and Welfare Fund, the Retirement Fund, and the Health Services Plan on and after September 20, 1989, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make whole the Health and Welfare Fund, the Retirement Fund, and the Health Services Plan for all contributions that would have been paid but for the Respondent's unlawful discontinuance of payments[2] and to make unit employees whole as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), the amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Tammy Sportswear Corporation, Boston, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Joint Board Cloak, Skirt and Dressmakers' Union, International Ladies' Garment Workers' Union, AFL–CIO, by failing and refusing to make contractually required monetary payments to the Union's Health and Welfare Fund, the Retirement Fund, and the Health Services Plan.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all contributions to the Health and Welfare Fund, the Retirement Fund, and the Health Services Plan that have not been paid and that would have been paid in the absence of the Respondent's unlawful discontinuance of the payments, and make unit employees whole, in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of payment due under the terms of this Order.

(c) Post at its facility in Boston, Massachusetts, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our ''make-whole'' remedy. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Joint Board Cloak, Skirt and Dressmakers' Union, International Ladies' Garment Workers' Union, AFL–CIO, by failing and refusing to make contractually required monetary payments to the Health and Welfare Fund, the Retirement Fund, and the Health Services Plan.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make all contributions to the aforementioned Funds and Plan that have not been paid and that would have been paid in the absence of our unlawful discontinuance of the payments, and make unit employees whole, with interest.

TAMMY SPORTSWEAR CORPORATION